

1160-1

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
OF THE STATE OF WASHINGTON

SAVAGE ENTERPRISES, INC.	)	
	)	
Appellant,	)	PCHB No. 87-176
	)	
v.	)	FINAL FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
PUGET SOUND AIR POLLUTION	)	AND ORDER
CONTROL AUTHORITY,	)	
	)	
Respondent.	)	

THE MATTER, the appeal of a civil penalty of \$250, for alleged violation of regulations regarding the removal of asbestos materials, came on for hearing before the Board, Wick Dufford, presiding, on April 18, 1988, in Lacey, Washington. Board member Judith A. Bendor has reviewed the record. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

At hearing appellant was represented by Douglas W. Elston, Attorney at Law. Respondent was represented by its attorney, Keith McGoffin. The proceedings were reported by Gene Barker and Associates.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant Savage Enterprises is an asbestos removal contractor.

II

Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a municipal corporation empowered to carry out a multi-county program of

1 air pollution prevention and control. The agency's geographic  
2 jurisdiction includes the site of the incidents at issue. The Board  
3 takes notice of the provisions of PSAPCA's Regulation I.

### 4 III

5 In January, 1987, pursuant to notices of intent pre-filed with  
6 PSAPCA, Savage performed asbestos removal in the old Cogswell-Meath  
7 building in downtown Tacoma. The structure had been unoccupied for  
8 some time and was in an advanced state of disrepair. The roof had  
9 fallen in; the windows were broken; a large amount of asbestos  
10 insulation remained on pipes and ceilings.

11 The asbestos removal was carried out preparatory to the  
12 building's being demolished.

### 13 IV

14 During the course of the job, PSAPCA's inspector visited the site  
15 on numerous occasions to check on the on-going operations of Savage's  
16 workers. No infractions of the agency's rules were observed during  
17 these pre-completion visits.

18 On January 28, 1987, by prior arrangement with Savage's on-site  
19 foreman, PSAPCA's inspector arrived at the site to make a routine  
20 final compliance inspection of the completed project. It was  
21 understood by the inspector and confirmed by the foreman that the  
22 asbestos removal work at the site had been finished. The foreman  
23 accompanied the inspector in looking over the areas where Savage  
24 employees had worked.

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V

In the course of the inspection, on the mezzanine level, the inspector observed a metal pipe from which Savage's workers had removed asbestos insulation. Running parallel to this pipe was a plastic pipe which had not been insulated.

On the plastic pipe the inspector found a dry, friable chunk of what appeared to be asbestos insulation. He also observed similar pieces of dry, friable material left on the metal pipe and on the floor beneath it.

The inspector took the chunk of material (slightly larger than a quarter dollar) from the plastic pipe to use as a sample, and took two photographs to document his observations.

VI

Savage's foreman, on being shown the materials on and below the pipe, took immediate steps to clean it up. The inspector looked on as workers began to prepare the area for removal of the residual debris.

Because the materials were found in the immediate vicinity of an area where Savage had performed work, and absent any evidence of intervening activity at that location, we find that the asbestos fragments were where they were as a result of the acts or omissions of Savage.

VII

The sample taken by PSAPCA's inspector was forwarded to the state Department of Ecology's laboratory in Manchester, Washington, using

1 appropriate chain of custody procedures.

2 Analysis performed at the laboratory showed the sample to contain  
3 60 percent chrysotile and 20 percent amosite asbestos.

4 The Board takes notice that polarized light microscopy used at  
5 the Manchester lab is a recognized technique for analyzing the  
6 asbestos content of samples and that the estimates of asbestos content  
7 derived therefrom are generally regarded as accurate in the scientific  
8 community. (See Appendix A, Subpart F, 40 CFR Part 763 -- Interim  
9 Method of the Determination of Asbestos in Bulk Insulation Samples.)

#### 10 VIII

11 On February 20, 1987, PSAPCA mailed to Savage a Notice of  
12 Violation (No. 021849), relating to the observations made on January  
13 28, 1987. This notice cited violations of PSAPCA's Regulation I,  
14 Sections 10.04(b)(2)(iii)(A) and (B). Under description of violation  
15 the notice stated:

16 Causing or allowing asbestos materials that have  
17 been removed or stripped NOT to be:  
18 (A) Adequately wetted to ensure that they remain  
19 wet until collected for disposal;  
(B) Collected for disposal at the end of the  
working day.

20 The notice gave the location of the violation as 1346 Pacific Avenue,  
21 Tacoma, Washington, which is the correct address of the  
22 Cogswell-Meath building. The notice also indicated that WAC  
23 173-400-075 had been violated.

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IX

On June 22, 1987, the agency mailed to Savage a Notice and Order of Civil Penalty (No. 6707), assessing a fine of \$250 and describing violations as follows:

On or about the 28th day of January, 1987, in Pierce County, State of Washington, you violated WAC 173-40C-075 and Article 10 of Regulation I by unlawfully causing or allowing the removal or encapsulation of asbestos materials at 1346 Pacific Avenue, Tacoma, Washington, and failing to comply with the following sections of Article 10 of Regulation I:

1. Section 10.04(b)(2)(iii)(A) of Regulation I: Failure to adequately wet the asbestos-containing materials and to ensure that they remain wet until collected for disposal -- Notice of Violation No. 021840.

2. Section 10.04(b)(2)(iii)(B) of Regulation I: Failure to collect the asbestos-containing material for disposal at the end of each working day -- Notice of Violation No. 021849.

The description of the acts or omissions constituting the infractions is an accurate paraphrasing language of the reference sections of Regulation I.

X

On July 20, 1987, Savage filed its appeal of the civil penalty with this Board. The case was assigned our cause number PCEB 87-176.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to the following

FINAL FINDINGS OF FACT,  
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CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter. Chapters 43.21B RCW and 70.94 RCW.

II

In PCW 70.94.431, the Washington Clean Air Act provides for the assessment by air pollution control authorities of civil penalties for violation of the Act or of regulations implementing it. The penalty shall be "in an amount not to exceed one thousand dollars per day for each violation," and each violation is considered a separate and distinct offense.

The penalty is to be imposed by a notice in writing "describing the violation with reasonable particularity."

III

Savage argues that the penalty here should be dismissed because the violations were not described "with reasonable particularity."

As to the asserted violation of WAC 173-400-075, we agree. That section is a part of the general state regulation for air pollution sources and, as to asbestos, relates that the state incorporates as its regulations certain referenced federal regulations. The notice provided by PSAPCA gives no indication whatsoever of the particulars within these interconnected references which Savage is accused of failing to meet. We conclude that the notice must at least recite the specific regulatory requirement asserted to be violated.

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(6)

However, we point out that the threshold of "reasonable particularity" is not a high one. These are civil wrongs, not criminal offenses. What is required is enough specificity to provide notice of the general nature of the purported violations. The full range of discovery normally available in civil litigation is available to parties in these proceedings. WAC 371-08-031. It is not difficult to obtain a more definite statement of the nature of a violation and related acts or omissions in order to be able to prepare a proper defense.

Accordingly, under the facts, we conclude that the description of the asserted violations of Regulation I in PSAPCA's notices meet the "reasonable particularity" standard.

## IV

Savage suggests PSAPCA has not shown that the material found by the inspector was asbestos material. "Asbestos Material" as defined in January, 1987, was material containing more than 1% asbestos by weight. Regulation I, Section 10.02 was amended on January 14, 1988, to contain the following definition:

(e) "Asbestos Material" means any material containing at least one percent (1%) asbestos as determined by polarized light microscopy using the Interum Method of the Determination of Asbestos in Bulk Insulation Samples contained in Appendix A of Subpart F in 40 CFR Part 763, unless it can be demonstrated that the material does not release asbestos fibers when broken, crumbled, pulverized or otherwise disturbed."

1 Savage made no demonstration that the material was not friable.

2 In an earlier case involving the same litigants, we determined  
3 that the volumetric percentage of asbestos determined by the method  
4 referenced in the above definition converts to essentially the same  
5 percentage measured by weight. Savage Enterprises, Inc. v. PSAPCA,  
6 PCHB No. 87-164 (March 28, 1988). Nothing was shown here which would  
7 call that determination into question.

8 V

9 Savage contends that the violations asserted were not proven by  
10 PSAPCA because the inspector was not on hand to observe the  
11 procedures followed by the workers while they were performing the  
12 removal.

13 The violations of Section 10.04 cited relate to two distinct  
14 procedures to be followed before the job is completed. First,  
15 asbestos materials that have been removed or stripped must be  
16 adequately wetted to ensure they remain wet until "collected for  
17 disposal." The latter is a defined term meaning "sealed in a  
18 leak-tight, labelled container while wet." Section 10.02(i).  
19 Second, the wet materials must be bagged and sealed at the end of  
20 each working day.

21 Here we have found that the asbestos materials discovered on  
22 site by the inspector were there as a result of the acts or omissions  
23 of Savage. The job had been completed when the inspector made his  
24 observations. As to the materials found, the necessary inference is,  
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1 therefore, that Savage's workers had not followed the proper  
2 procedure of wetting and bagging while the job was in progress.

3 VI

4 Savage argues that PSAPCA lacks the statutory authority to  
5 promulgate or enforce regulations for the removal of asbestos inside  
6 a building. The company's position on this issue was rejected in our  
7 decision in Savage Enterprises, Inc. v. PSAPCA, PCHE 87-164 (March  
8 28, 1988). We adhere to our decision and reasoning in that case.

9 In addition, we note that PSAPCA's asbestos regulations are part  
10 of a larger regulatory scheme. Asbestos is among the extremely  
11 dangerous substances which are the subject of National Emission  
12 Standards for Hazardous Air Pollutants (NESHAPS) promulgated by the  
13 United States Environmental Protection Agency (EPA) pursuant to the  
14 federal Clean Air Act.

15 The federal standards consist of work practices, similar to  
16 those in PSAPCA's Regulation I, Article 10, and are applicable  
17 indoors as well as out. 40 CFR 140 et sec. The federal Clean Air  
18 Act specifically authorizes such requirements. 42 USC 7412 (e)(1).

19 The state Clean Air Act is intended to comply with the  
20 requirements of the federal Act. RCW 70.94.011, 70.94.510,  
21 70.94.785. The intergovernmental scheme is one of comparable or  
22 greater stringency as one progresses from the federal to the state to  
23 the local level. 42 USC 7416; RCW 70.94.331.

24 On the basis of this legal structure, EPA has delegated to the

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1 State of Washington the conduct of the federal NESHAPS program for  
2 asbestos. 40 CFR 61.04(b)(WW). The state Department of Ecology has  
3 accepted this delegation through the adoption of WAC 173-400-075.  
4 PSAPCA is carrying out the program in its region through its own  
5 regulations which are equal to or more stringent than the  
6 federal-state regulations.

7 Regulations adopted pursuant to state law are valid if they are  
8 reasonably consistent with the statute they are intended to  
9 implement. Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310,  
10 545 P.2d 5 (1976). PSAPCA's powers include adopting rules consistent  
11 with the purposes of the state Clean Air Act. RCW 70.94.141.  
12 Because one of the purposes of the state Act is to comply with the  
13 federal Act, PSAPCA's asbestos rules, which effect such compliance,  
14 are within the authority granted under state law.

#### 15 VII

16 Savage maintains that they cannot be penalized for asbestos left  
17 on a pipe because the regulations cited deal with asbestos removal.  
18 They argue that PSAPCA is improperly entering the area of contract  
19 enforcement.

20 In the instant case, the facts are that some of the  
21 asbestos found by the inspector had been removed. However, even as  
22 to the asbestos left on the previously insulated pipe, we believe the  
23 cited regulatory sections apply.

24 The evidence shows that Savage's announced intention was to  
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1 remove asbestos before demolition of the building. Except under  
2 exceptional circumstances not demonstrated here, demolition may not  
3 occur until all asbestos is removed. Regulation I, Section  
4 10.04(a). Where removal is contemplated, we conclude that any  
5 asbestos left behind in a dry, friable state constitutes a violation  
6 of the wetting and bagging requirements of the rules. While the  
7 introductory words to Section 10.04(b)(2)(iii) speak to "asbestos  
8 materials that have been removed or stripped," we believe it an  
9 appropriate gloss on the regulations, under the instant facts, to  
10 apply them to materials missed in the removal and stripping process.  
11 Otherwise the purpose of preventing the release of asbestos fibers  
12 during demolition might be frustrated without regulatory sanction.

#### 13 VIII

14 Based on the facts we have found, we conclude that Savage on the  
15 date in question violated Regulation I, Sections 10.04(b)(2)(iii)(A)  
16 and (B).

17 No contention was made that the amount of penalty assessed is  
18 excessive. We note that the \$250 fine is substantially below the  
19 statutory maximum of \$1000 per violation.  
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IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

ORDER

Notice and Order of Civil Penalty No. 6707 is AFFIRMED.

Done this 24th day of January, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Duford  
WICK DUFRORD, Chairman

Judith A. Bender  
JUDITH A. BENDER, Member